Supreme Court, U.S.
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No. 88-1188

In The

# Supreme Court of the United States

October Term, 1988

STEVEN D. LEARNED,

*Petitioner,*

vs.

CITY OF BELLEVUE, a municipal corporation,

*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Should the mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination, automatically trigger the protection afforded under section 704(a) of Title VII regardless of whether the underlying discrimination can reasonably be perceived as discrimination prohibited by Title VII?

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## REASON FOR DENYING THE PETITION

The decision of the Ninth Circuit is not in conflict with any other federal court of appeals decision with regard to the federal question presented by the Petitioner.

## STATEMENT OF THE CASE

Petitioner, Steven Learned, a white male, has been employed by the respondent, City of Bellevue ("employer"), since 1975. In 1984 Learned filed a complaint in federal district court alleging that the employer had discriminated against him in violation of 42 U.S.C. §2000e-3 (section 704(a) of Title VII), and had deprived him of civil rights under the Fourteenth Amendment of the United States Constitution in violation of 42 U.S.C. §1983. Learned also alleged several pendent state claims for relief.

The district court granted the employer's motion for summary judgment and dismissed Learned's federal and pendent state claims. Learned appealed the dismissal of his federal claims to the Ninth Circuit which affirmed the dismissal. *Learned v. City of Bellevue,* 860 F.2d 928 (9th Cir. Nov. 3, 1988). Pursuant to his petition for a writ of certiorari, Learned seeks review by this Court of the dismissal of his Title VII claims.

## FEDERAL QUESTION PRESENTED

In support of his petition, Learned contends that, "[T]his case presents an important federal question under

Title VII of the Civil Rights Act which answers (sic) are now in conflict among the Federal Circuit and District Courts." (Petition, p. 6) Learned characterizes this federal question as follows:

> "Must the conduct which is opposed actually violate Title VII to sustain a federal claim of employer retaliation." (Petition, p. 6)

This statement misrepresents the holding of the Ninth Circuit which applied the "reasonable belief" standard that has been adopted by all federal circuits addressing the same issue.

### Decision of the Ninth Circuit

Learned contended on appeal to the Ninth Circuit that the district court erred in granting summary judgment on his claim under the anti-retaliation provision of section 704(a) of Title VII. Learned, however, never alleged nor argued that he opposed any discrimination based upon race, color, religion, sex, national origin or any other classification arguably protected under Title VII. Learned alleged only that the retaliation by the employer was related to his filing of a state industrial insurance lawsuit in state court and to his opposition to what he believed was discrimination based upon his physical and mental limitations.

Learned does not contend that the employer engaged in discrimination which is prohibited under Title VII. Instead, Learned contends that it doesn't matter whether the alleged discrimination he opposed is, or can reasonably be perceived to be, prohibited by Title VII, but only

whether Learned, as a totally subjective matter, reasonably believed such discrimination was in violation of Title VII.

The Ninth Circuit rejected Learned's argument, concluding with regard to the "opposition clause" claim that:

> "Although courts liberally construe the provisions of section 704(a) to effectuate the remedial purposes of the Act, see, e.g., *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978), the opposition clause, by its terms, protects only those employees who oppose what they reasonably perceive as discrimination under the Act. An employee need not establish that the opposed conduct in fact violated the Act in order to establish a valid claim of retaliation. *Id.* That is, an employee may fail to prove an "unlawful employment practice" and nevertheless prevail on his claim of unlawful retaliation. However, the opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation. (cites omitted) *Learned v. Bellevue* at 932.

The Ninth Circuit further concluded with regard to the "participation clause" claim that:

> "The participation clause is broadly construed to protect employees who utilize the tools provided by Congress to protect their rights. *Sias*, 588 F.2d at 695. As with the opposition clause, it is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation. *Id.* "If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled." *Id.* (citation omitted) *Learned v. Bellevue* at 932.

Under no reasonable reading of the Ninth Circuit's decision can it be contended that the Ninth Circuit required

proof that the employer's action was actually in violation of Title VII in order to sustain a claim of retaliation under section 704(a); yet this is precisely the issue Learned presents to this Court for review.

## CONFLICT BETWEEN THE CIRCUITS

Learned contends that a conflict exists between the decisions of the circuit and district courts regarding the nature of the protection provided by the "opposition" and "participation" clauses of section 704(a). Learned characterizes this conflict in his "Questions Presented" as follows:

> Whether the practice opposed under the "opposition clause" of Title VII, section 704(a) must be a violation of the Act to sustain a federal action for retaliation or whether it can be based upon the reasonable belief of the employee at the time he files his discrimination claim with the state and federal agencies?" (Petition, p. i).

Learned, however, has never cited any case, nor is the employer aware of any case, which supports his contention that the protection of the "opposition" and "participation" clauses of section 704(a) applies to anyone having a reasonable belief that he opposes an unlawful practice under Title VII regardless of whether the discrimination opposed can reasonably be perceived as violating Title VII.

In fact, there is no conflict between the federal circuits regarding the standard of protection afforded by section 704(a). The Ninth Circuit applied the same standard in the instant case that has been adopted by all other federal circuits considering the same matter:

> The mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination, however, does not automatically trigger the protection afforded under section 704(a): the underlying discrimination must be reasonably perceived as discrimination prohibited by Title VII. *Learned v. Bellevue* at 932.

The Ninth Circuit previously adopted this "reasonable belief" standard in *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978); reiterating its opinion in *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983) that:

> The employee's statement cannot be "opposed to an unlawful employment practice" unless it refers to some practice by the employer that is allegedly unlawful. It is not necessary, however, that the practice be demonstratively unlawful; opposition clause protection will be accorded whenever the opposition is based on a "reasonable belief" that the employer has engaged in an unlawful employment practice. (cites omitted)

The Tenth Circuit in *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) recognized that there is no conflict in the circuit courts with regard to this issue, concluding that:

> Every circuit that has considered the issue, however, has concluded that opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated. See, e.g., *Rucker v. Higher Education Aids Board*, 669 F.2d 1179, 1182 (7th Cir. 1982); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982); *Payne v. McLemore's Wholesale and Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); *Parker v. Baltimore and Ohio*

*Railroad Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); see also *Mitchell v. Visser*, 529 F.Supp. 1034, 1043 (D.Kan.1981).

The conflict that Learned claims exists is not between the "subjective" standard (which he champions but no federal court has adopted) and the "reasonable belief" standard which the Ninth Circuit applied. Rather, it is an alleged conflict between the "reasonable belief" standard and a more stringent standard requiring proof of an actual violation of Title VII to trigger the protection of section 704(a). However, even if such a conflict exists, which the employer contends does not, it is completely irrelevant to the issue in the instant case. Neither party contends that an "actual violation" standard applies; nor did the Ninth Circuit apply an "actual violation" standard in reaching its decision. This "conflict" appears to be cited solely for the purpose of satisfying the review criteria of Supreme Court Rule 17.

**Actual Violation Standard**

In support of his contention that a conflict exists, Learned cites a prior Ninth Circuit decision, *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) and two other district court decisions as adopting the "actual violation" standard. In fact, the only case cited by Learned that adopts the "actual violation" standard, *EEOC v. C&D Sportswear Corp.*, 398 F.Supp. 300 (M.D.Ga. 1975) was specifically criticized and not followed by the Fifth

Circuit in *Payne v. McLemore's Wholesale and Resale Stores*, 654 F.2d 1130, 1139 n.9 (5th Cir. 1981).[1]

**Reasonable Belief Standard**

It is also apparent that Learned misconstrues the "reasonable belief" standard applied by the Ninth Circuit. While that standard does in fact afford protection to those employees who have a "reasonable belief" that the employer has discriminated under Title VII, such discrimination must arguably be in violation of Title VII. In each circuit court decision cited by Learned as adopting the "reasonable belief" standard, the activity of the employer complained of was, contrary to the instant case, discrimination arguably in violation of Title VII.[2]

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[1] *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) cited by Learned, does not adopt the "actual violation" standard. In Silver the plaintiff opposed the racially discriminatory acts of a co-worker. The Ninth Circuit dismissed the plaintiff's "opposition" clause claim, concluding that the opposition must be directed at an unlawful employment practice of the employer and not an act of discrimination by an employee whose actions the employer is not legally responsible for. See *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983) wherein the Ninth Circuit distinguished its decision in *Silver*. See also *Blizzard v. Newport News Redevelopment & Housing Authority*, 670 F.Supp. 1337, 1343 n.5 (E.D. Va. 1984) which further analyzes and distinguishes *Silver*.

[2] *DeAnda v. St. Joseph Hospital*, 671 F.2d 850 (5th Cir. 1982) (discrimination based on race); *Payne v. McLemore's Wholesale and Retail Stores, supra* (discrimination based on race); *Rucker v. Higher Education Aids Board*, 669 F.2d 1179 (7th Cir. 1982) (discrimination based on sex and race); *Berg v. LaCrosse Cooler*

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Learned has never contended that the alleged discrimination he opposed was in violation of Title VII. Under Learned's argument, if a person has a reasonable belief (perhaps based on the advice of his attorney) that Title VII prohibits discrimination against blue-eyed people, his opposition to such discrimination would be protected under section 704(a). No federal court has adopted this standard.

## CONCLUSION

The decision of the Ninth Circuit is not in conflict with a decision of any federal court of appeals; nor is there any other reason to grant review of this matter. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Company*, 612 F.2d 1041 (7th Cir. 1980) (discrimination based on sex); *Monteiro v. Poole Silver Company*, 615 F.2d 4 (1st Cir. 1980) (discrimination based on race); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984) (discrimination based on sex); *Zack v. City of Minneapolis*, 35 FEP 1572 (D.Minn. 1984) (discrimination based on sex); *Croushorn v. Board of Trustees of the Univ. of Tenn.*, 518 F.Supp. 9 (D.Tenn. 1980) (discrimination based on race).